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Supreme Court, U.S.
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No. 00-207

IN THE
SUPREME COURT OF THE UNITED STATES

Sylvia J. Wasson, an Individual,
Petitioner,

v.

Sonoma County Junior College District; Governing Board of the Sonoma County Junior College District; Robert F. Agrella; James Mitchell; John Roberts,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LARRY FRIERSON *
LAW OFFICE OF LARRY FRIERSON
50 SANTA ROSA AVENUE
SUITE 501
SANTA ROSA, CA 95401
(707) 577-7973

ROBERT HENRY
SCHOOL & COLLEGE LEGAL SERVICES
5340 SKYLANE BLVD.
SANTA ROSA, CA 95403
(707) 524-2690

Counsel for Respondents

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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I.

INTRODUCTION

Despite adverse rulings from different state and federal courts, Petitioner SYLVIA WASSON ("WASSON") continues to pursue this action for damages against the Respondents SONOMA COUNTY JUNIOR COLLEGE, GOVERNING BOARD OF THE SONOMA COUNTY COLLEGE DISTRICT, ROBERT F. AGRELLA, JAMES MITCHELL; JOHN ROBERTS (hereinafter collectively referred to as "THE DISTRICT") arising out of an incident that occurred in 1997, pertaining to the DISTRICT's alleged conduct in investigating the events surrounding the authorship and widespread dissemination of six anonymous documents throughout a public community college's campus community. The documents were distributed to the news media and to the general public through targeted mailings and caused disruption of the orderly administration of the College, ultimately, causing the DISTRICT to issue a Notice of Intent to Dismiss to WASSON on the basis of its belief in her authorship and dissemination of these documents.

Despite misleading statements of facts in her Petition to the contrary, WASSON has strenuously and continuously denied authorship of the letters, including statements of denial under oath. Yet she still seeks to assert the Constitutional protections of the First Amendment free speech clause without satisfying the requirements of standing.

As the United States Circuit Court for the Ninth Circuit and the California Court of Appeal have already correctly concluded based on clear existing legal authority, ***a public employee cannot maintain a claim against her employer based on a violation of her rights to free speech***

when she denies having engaged in the speech in question.

WASSON's Petition fails to present an issue that gives rise to any need for this Court to Review any unsettled question of law.

II.

LEGAL ARGUMENT
WHY REVIEW SHOULD NOT BE GRANTED

A. REVIEW SHOULD BE DENIED BECAUSE THE PETITION FAILS TO GIVE RISE TO A GROUND FOR REVIEW UNDER RULE 10 OF UNITED STATES SUPREME COURT

1. Grounds for Review

Rule 10 of the United States Supreme Court Rules requires parties seeking review by the Supreme Court of the United States to state a compelling reason for review.

WASSON's Petition presents two arguments for granting the writ:

ARGUMENT A.

> "It is Counterintuitive to Require The Protection of Anonymous Speech Rights Be Contingent on the Waiver Of this Right"; and;

ARGUMENT B.

"A Litigant Has Standing to Assert An Anonymous Speech Claim When Her Pleading Shows That She Suffered An "Injury In Fact" Due To A Public Employer's Efforts To Suppress The Protected Speech Of Another Person."

While she does not specifically identify which of the Rule 10 reasons the Court should consider in granting her Petition, it appears she is relying upon Rule 10(C): ". . . . an important question of federal law that has not been, but should be, settled by this Court." However, for the reasons set forth below, existing law as to anonymous speech rights is not in conflict with this case and is not unsettled. Moreover, as discussed below, the Petition relies upon misstatements of fact and the issues presented do not coincide with the issues raised by Petitioner in the lower Courts.

2. **The Law is not "Unsettled"**

Three other United States Circuit Courts have came to the same conclusion as the Ninth Circuit in the instant case based on very similar facts as follows:

(1) *Jones v. Collins* 132 F.3d 1048, 1054 (5th Cir. 1998). The plaintiff in this case, Ethel Jones, an elementary school principal, alleged that her First Amendment rights were violated because she was transferred to a lower position after she was accused of making certain negative comments about an administrative action. However, Ms. Jones (like Dr. WASSON herein), denied having made any comments. The Court thus found that in the absence of any actual expression

by Jones which is subject to First Amendment protection, there can be no constitutional violation.

(2) *Barkoo v. Melby* 901 F.2d 613 (7th Cir. 1990). Plaintiff alleged that she was constructively discharged from her position as a communications operator for the police department based upon her supervisors' erroneous belief that she had discussed a matter relating to the department with local media. The court concluded that the plaintiff could not establish a violation of her First Amendment right to free expression where she insisted she did not make the speech in question.

(3) *Fogarty v. Boles* 121 F.3d 886 (3d Cir. 1997). The Plaintiff in this case, also a school teacher, claimed he was punished based upon the school principal's erroneous belief that he had contacted the press about a matter of public interest at the school. The court held that the teacher failed to meet his burden of proving a violation of his free speech because he denied contacting, attempting to contact, or having any intention of contacting the press.

All three of these cases replicate the same holding applied to the WASSON case by the Ninth Circuit: One who denies speaking has no standing to assert the protections of free speech. (See also *Moran v. Washington* 147 F.3d 839, 846 (9th Cir. 1998).)

Petitioner attempts to draw a distinction by arguing that in the above-referenced cases there was no objectively manifested speech at all whereas in her case, there is speech that has been denied. The distinction does not change the reasoning of the Courts' holdings. "A free speech claim depends on speech. (*Fogarty*, supra, quoting *Pro v. Donatucci* 81 F.3d 1283, 1292 (3d Cir. 1996). Since WASSON denies

having made any speech, taking her at her word, there is no speech to which the Constitutional protection of the First Amendment would apply.

Petitioner also argues that *Watters v. Churchill* 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 was misapplied by the Ninth Circuit. However, she erroneously bases this argument on her contention that:

> "Her claim was not based solely upon being falsely accused of being the anonymous author. Rather, it was asserted to protect the First Amendment anonymous speech rights held by other District employees and herself." (Petition, Pg. 19, Paragraph 3).

However, as indicated above, Petitioner misstates her assertions which have consistently and vehemently stated that she was not the author of the anonymous letters — not that she was denying authorship for other altruistic reasons. Nowhere in her Complaint is there a reference to seeking protection of anonymous speech, either for herself or another party. The Ninth Circuit predicated its finding upon her not being engaged in the speech in question. She now, in the Petition for the first time, seeks to change that predicate and suggest that she (and others) engaged in the speech and had to deny authorship to preserve the right to anonymous speech. The Court should not presume such prior perjury on the part of Petitioner. It should take her at her word (given under oath) and let the natural and logical consequences of that denial lead to the result of no protection, found by every Court which has ever addressed this issue.

B. THE PETITION SETS OUT MATERIAL MISSTATEMENTS

In compliance with United States Supreme Court Rule 15.2, Respondents contend that there are significant misstatements in the Petition that bear on the issues presented for the Court as follows:

1. Contrary to the Contention in her Petition, Petitioner Was Not Required to Waive Anonymous Speech Rights

Argument A of the Petition asserts that:

> "It is Counterintuitive To Require The Protection of Anonymous Speech Rights Be Contingent Upon the Waiver Of This Right."

However, Petitioner WASSON has never been required to waive her right to anonymous speech. From the very beginning of this action and her companion state court action, WASSON has continuously and vehemently denied authorship of the anonymous letters. The District Court complaint never even suggested that WASSON was protecting her or anyone else's anonymous speech rights.[1] Nevertheless, the Petition now argues that WASSON had to deny authoring these documents or stating her association with the actual anonymous author to preserve her anonymous speech rights.

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[1] Paragraph 26. of the First Amended Complaint states: "DR. WASSON is not the author or disseminator of the five anonymous letters and one flyer which were the sole basis for defendant's ROBERTS' recommendation and the DISTRICT's decision to terminate DR. WASSON."

Respondents do not dispute that certain anonymous speech is protected under the United States Constitution. However, when a person is questioned about "anonymous" speech, there are three answers that can be given:

1. Acknowledge making the speech (authorship);

2. Decline to state based on the protection of the First Amendment; or

3. Deny making the speech.

Here, Petitioner WASSON denied making the speech. Although she now contends that she had to do so in order to preserve her rights to anonymous speech, as is indicated above, this is an incorrect assertion. She could have instead declined to respond regarding authorship and sought the protection of the First Amendment for anonymous speech.

In fact, by denying having made the speech in question she is not protecting the anonymous speech of a third party. If the goal of her response was to protect a First Amendment right to anonymous speech for a third person, her response should have been "decline to state." Accordingly, Petitioner's argument for review is premised on an incorrect assertion as well as setting out implications that contradict her prior sworn denials of authorship.

Additionally, Petitioner did not raise this argument in her federal court complaint. Instead, she strenuously and repeatedly argued that she was "falsely accused of authorizing and disseminating anonymous hit pieces." (Complaint, Pg. 9, Paragraph 33). The Ninth Circuit, in the discussion section of the opinion of February 16, 2000 (see APPENDIX A to the Petition, Pg. 5a, *Wasson v. Sonoma County Junior College et*

al. (9th Cir. 2000) 203 F.3d 659) further reflects Petitioner's position in the lower courts:

> "This First Amendment case is unusual because Wasson asserts that the defendants retaliated against her for speech that she insists she did not make. Accepting Wasson's allegations as true, she thus had not engaged in any relevant constitutionally protected speech. Yet, she claims that her free speech rights under the First Amendment were violated because the defendants falsely imputed to her the letters critical of Agrella."

Accordingly, the Petition is factually misleading as to this issue incorrectly making it appear that Petitioner has continuously asserted a right to anonymous speech when in reality she has always ***denied*** authorship.

2. <u>Petitioner was not Terminated</u>.

While the DISTRICT proceeded with the process leading toward eventual dismissal, Petitioner WASSON was placed on paid administrative leave. She remained in such paid status until the Governing Board withdrew its intent to dismiss notice three months later. Petitioner was never terminated from employment. Petitioner never lost a day's pay. Petitioner remains a tenured faculty member of the DISTRICT to this date with no interruption of her paid employment status.

3. <u>Handwriting Analyst was Competent</u>:

Petitioner also takes liberty with other factual issues by stating that the factual issues are undisputed when in fact they

are disputed. Petitioner claims on Page 2, Paragraph 1, that the District hired a handwriting analyst without properly investigating her competency or prior false identifications made by her. This is a disputed statement. The District asserts that the handwriting analysis was competent.

CONCLUSION

Petitioner has failed to raise a compelling reason for this court to exercise its discretion and grant review of her case. As such, Respondents respectfully request that this Court deny review of the Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____
Larry Frierson
Law Office of Larry Frierson
50 Santa Rosa Avenue, Suite 501
Santa Rosa, CA 95401
(707) 577-7973

Counsel of Record

ROBERT HENRY
School & College Legal Services
5340 Skylane Blvd.
Santa Rosa, CA 95403
(707) 524-2690

Attorneys for Respondents